UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION

INTERNATIONAL BROTHERHOOD OF TEAMSTERS and its affiliated LOCAL UNION NO. 776 (UNITED PARCEL SERVICE, INC.)

and Case 04-CB-166651

HENRY HAIRSTON, an Individual

and Case 04-CB-170828

JAMES WISE, an Individual

BRIEF BY COUNSEL FOR THE GENERAL COUNSEL

To: Honorable Robert A. Giannasi
Chief Administrative Law Judge

Respectfully submitted,

Dated: March 16, 2017

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TABLE OF CASES

I. STATEMENT OF THE CASE

This case involves two employees represented by International Brotherhood of Teamsters and its affiliated Local Union No. 776 (Respondent) who work out of or at a United Parcel Service, Inc. (UPS) facility in Harrisburg, Pennsylvania, known as the Harrisburg Hub.

On December 28, 2015, Charging Party Henry Hairston (Hairston) filed the charge in Case 04-CB-166651, and a copy was served on Respondent by U.S. mail on December 28, 2015. On May 31, 2016, Hairston filed an amended charge in in Case 04-CB-166651, and a copy was served on Respondent by U.S. mail on May 31, 2016. (GCX1(a), (b), (g), (h)).[1] A Complaint and Notice of Hearing issued in Case 04-CB-166651 on June 27, 2016. (GCX1(i)).

On March 2, 2016, Charging Party James Wise (Wise) filed the charge in Case 04-CB-170828 and a copy was served on Respondent by U.S. mail on March 2, 2016. Wise filed the first amended charge in Case 04-CB-170828 on March 22, 2016, and a copy was served on Respondent by U.S. mail on March 23, 2016. Wise filed the second amended charge in Case 04-CB-170828 on June 27, 2016, and a copy was served on Respondent by U.S. mail on June 28, 2016. (GCX1(c)-(f), (k),(l))

An Order Consolidating Cases and Consolidated Complaint issued in Cases 04-CB-166651 and 04-CB-170828 on July 14, 2016. (GCX1(o)).

The Consolidated Complaint alleges that Respondent violated Section 8(b)(1)(A) of the Act by threatening member and employee Jason Nulton with the filing of internal union charges if he acted as a witness in connection with Charging Party Hairston's July 15, 2015 grievance;

[1] Throughout this brief, abbreviated references are employed as follows: "T" followed by page number to designate Transcript pages; "GCX" followed by exhibit number to designate General Counsel's Exhibits; "RX" followed by exhibit number to designate Respondent's Exhibits; and "JS" to designate the Joint Stipulation.

further alleges that Respondent violated Section 8(b)(1)(A) and (2) of the Act by shop steward Robert Sholly at the annual bid on January 25 or 26, 2016, whiting out the name of Charging Party Wise from a Sorter position bid and putting his name instead on a package handler position, causing Wise not to be considered for the Sorter position by UPS; and further alleges that Respondent violated Section 8(b)(1)(A) of the Act by promising Wise on two occasions that it would process a grievance on his behalf concerning UPS's failure to consider and select Wise for a Sorter position and then failing to process a grievance on his behalf. Respondent filed Answers to the Complaint and Consolidated Complaint on July 14, 2016 and July 26, 2016 respectively. (GCX1(q), (r)) The Answer to the Consolidated Complaint admits service of the charges, jurisdiction, Respondent's status as both a labor organization and the exclusive representative for employees at the Harrisburg Hub, and the agency status of David Licht. As part of its affirmative defenses, Respondent asserted that the Consolidated Complaint allegations were time barred under Section 10(b). The hearing in this case was held on February 6, 2017. The record was held open at the request of Your Honor to provide additional evidence concerning five individuals identified by Charging Party Wise as working in the small sort department. (T. 70, 160)

On March 7, 2017, Counsel for the General Counsel submitted a motion attaching GCX-16(a)-(e) which provided the information requested and seeking the receipt of that exhibit.[2] On March 8, 2017, by email, Your Honor requested that Respondent provide its objections to GCX-16; requested a position statement on whether the record needed to be reopened, and requested a

[2] In addition, the Motion requested the admission of GCX-2, the National Master United Parcel Service Agreement, and GCX-3, the Central Pennsylvania Supplemental Agreement, which were marked for identification, were admitted to be authentic, and were referred to in testimony by General Counsel's and Respondent's witnesses, but Counsel inadvertently failed to offer them into evidence (T. 12-17, 26, 117, 121, 135, 162) No party had an objection to their admission. Counsel for General Counsel again requests that these exhibits be received into evidence.

joint stipulation addressing certain information. On March 10, 2017, Counsel for the General Counsel submitted a position statement arguing that the record did not need to be reopened. On March 13, 2017, the parties submitted a Joint Stipulation.

II. ISSUES

A. Whether Respondent, by Business Agent David Licht, violated Section 8(b)(1)(A) of the Act, in about October 2015 and again in March or April 2016, by threatening employee and member Jason Nulton with internal union charges if he acted as a witness in connection with Charging Party Hairston's July 15, 2015 grievance alleging racial harassment by one of Respondent's shop stewards? (Consolidated Complaint Paragraphs 5(c) and 6)

B. Whether Respondent, by Shop Steward Robert Sholly, violated Section 8(b)(1)(A) and (2) of the Act, on or about January 25 or January 26, 2016, by removing Charging Party James Wise's name from the bidding list for a Sorter position on the annual job bid sheet? (Consolidated Complaint Paragraphs 5(d), (e), (j), (k), 6 and 7)

C. Whether Respondent, violated Section 8(b)(1)(A) of the Act, when it failed and refused to file a grievance concerning UPS's failure to consider and select Charging Party Wise for a Sorter position? (Consolidated Complaint Paragraphs 5(f)-(j) and 6)

III. STATEMENT OF FACTS

A. Background

UPS is a party to a Master National UPS Agreement with the Teamsters which is runs from 2013 through 2018. It is also a party to the Central Pennsylvania Supplemental Agreement, with six Teamsters Locals including Respondent, which also runs from 2013 through 2018. (T. 12-13; GCX-2, GCX-3) Respondent represents all the non-supervisory employees employed by

UPS at UPS's Harrisburg Hub located at 1821 S. 19th Street in Harrisburg, Pennsylvania. (T. 11, 13)

The Harrisburg Hub is a large facility that has roughly 2,000 employees. There are feeder drivers, auto mechanics, plant and engineering mechanics who work out of the Harrisburg Hub. There are approximately 300 feeder drivers at the Harrisburg hub. There are also approximately 120 "inside" employees consisting of sorters, package handlers, and shifters. Of those, 75 are full-time Article 22.2 permanent positions. (T. 13, 17)

Article 51 of the supplemental agreement sets out the grievance procedure for the Harrisburg hub. Under the grievance arbitration procedure, a grievance is filed typically by a shop steward on behalf of an employee, although it could be filed by the Business agent as well.[3] Once the grievance is filed, the shop steward and the center manager meet on the grievance at a center level hearing. If it is unresolved at that point it goes to a local level hearing, which would be a meeting with the Labor manager, the business agent and the grievant. If it's still not resolved at that level then the next step is to docket the case to the Central Pennsylvania Parcel Area Grievance Committee (CPAPGC). That panel has two Employer representatives and two union representatives that sit on the panel. If the case is deadlocked there, it either goes to the National committee or it goes to arbitration. (T. 14-15; 117; GCX-3, p. 203-206)

On January 1, 2015, Edgar Thompson became Respondent's President and David Licht became Respondent's Business Agent at the Harrisburg Hub. (T. 114,) Robert Sholly has been a shop steward from 2003 to January 2015 when he also became a Business Agent. After two

[3] Employees can initiate a grievance by filling in a numbered grievance form. The grievance itself, though, as Respondent President Edgar Thompson testified "belongs to the union." (T. 117-118)

months, Sholly stepped down from that position and returned to the bargaining unit and his former position as a shop steward.(T. 141)

B. Henry Hairston's Grievance and the Threats to Jason Nulton

Henry Hairston, an African American, has been working as a full-time feeder driver for UPS for almost a decade at its Harrisburg hub facility. The feeder department at the Harrisburg facility has several shop stewards, including Leonard Monette, who also works as a feeder driver. David Licht, current Business Agent for Respondent, previously worked at the same facility, as a feeder driver. (T. 73-74, 161)

Since at least June 2014, Hairston has had a hostile relationship with Monette after Hairston observed Monette accessing an employee's file on the road supervisor's computer. Monette began calling Hairston "Black Opie" and also using other racial epithets against him that he found offensive.[4] As a result, Hairston filed a number of grievances alleging that Monette was harassing him. (T. 71, 76; GCX-11) One grievance that specifically alleged that Monette was using the "Black Opie" racial slur was processed by Licht. (GCX-11)

In May 2015, UPS disciplined Monette for harassment towards Hairston. (T. 192-193)

In July 2015, Jason Nulton, shop steward at that time for the feeder drivers, accompanied John Allen, Feeder Manager, on a "ride along" with Licht's approval. The purpose was to observe feeder drivers for the day without any one getting into trouble as a means of reducing accidents. (T. 95) Following the ride along, Nulton checked in with Licht, to tell him that everything went great. (T. 96) Licht reported to Nulton that Monette told him people were

[4] Respondent's attempts to characterize "Black Opie" as somehow friendly name calling by Monette as friendly bantering similar to Hairston's calling Monette Jack Reacher or Tom Cruise is belied by the record. (T. 87, 174-175) As acknowledged even by Licht, Respondent's own witness, Hairston repeatedly complained to management and to Respondent over Monette's behavior. (T. 175-176)

complaining that Nulton had gone on the ride along with the feeder manager. Specifically, Licht told Nulton that Monette said that he was walking through the guard shack and he had heard a conversation between Hairston and Owen Maslach, another feeder driver, stating that they were talking about Jason Nulton being out there with management walking around the yard. (T. 77, 95-96, 178-179) Nulton called Hairston to find out what Hairston's problem was with the ride along and to see if he could clarify the situation. Hairston told Nulton that, contrary to what Monette had said, he and Maslach were not talking about him at all. They were just chit-chatting when Monette walked by. (T. 77, 96) After speaking with Nulton, Hairston learned from Maslach that Monette admitted that he had made the whole thing up. (T. 77, 97)

As a result, on July 15, 2015, Hairston filed Grievance Nos. 53292 and 48287 complaining of Monette's continued harassment.[5] (T. 77; GCX-10) Hairston had a center level meeting over his grievance with Licht and Daren Pray, UPS Labor Manager, and Norm Wynn, Operations Manager. Pray told Hairston to write a statement of the events that happened with Monette and give it to Edgar Thompson, Respondent's President, Pray, and Licht. (T. 80, 85, 177-178)

On October 1, 2015, Hairston gave a written statement to Pray, recounting the July incident with Monette. He named Jason Nulton and Owen Maslach as his witnesses, and copied Licht and Thompson (T. 80-81; GCX-12) According to Licht, he had a conversation with Pray shortly after where Pray told Licht that he received the letter and he had the names. Pray said he wanted to interview the witnesses. Pray said, "You're on there, too." Licht, said, "Yes, I understand I'm on this letter." Two or three weeks later, the two met and Pray interviewed Licht. Licht refused to give a statement claiming he could not remember the details. (T. 179-180)

[5] Although there are two grievance numbers, Grievance 48287 is just a continuance of Grievance 53292 continued onto a second page. (T. 78, 84)

In the fall of 2015, Licht told Nulton during a phone call, presumably after Hairston had supplied his statement to Pray, that Pray wanted to talk to Nulton to get his side of the story for the situation at hand with Hairston and Monette. Licht was trying to set a meeting up with Pray. Licht went on to add that if Nulton would talk then board charges would be filed against Nulton if Monette were to get in trouble.[6] (T. 98-99, 103) At this point, Nulton was no longer a shop steward. (T. 102)

In January or February 2016, Nulton had a second phone conversation with Licht about setting up a meeting for Nulton to speak with Pray concerning Hairston's grievance. Licht again told Nulton that if he gave a statement that board charges would be filed against Nulton if Monette got in trouble. (T. 98-99, 103)

On March 25, 2016, Hairston had another meeting concerning his grievance but it was not resolved. (T. 82, 84; GCX-13)

In April 2016, a meeting was finally scheduled for Nulton to speak with Pray. Nulton met with Licht prior to the meeting outside the Feeder Manager's office. Licht told Nulton that if he went into the meeting and talked about the situation that internal union executive board charges would be filed against him if Monette were to get in trouble. Licht told Nulton that his advice would be just to say that he does not recall anything. (T. 98, 99-100, 103)

Following that conversation, Nulton and Licht met with Pray, in the Feeder Manager's office. Pray asked Nulton what happened. Nulton told him basically that he was not going to talk unless the company was going to protect him. Nulton testified that he was in a situation where if he talked, he was afraid he was going to get internal union board charges and he was afraid of losing his job. (T. 100-101) Although denying that Nulton made statements of that type

[6] Nulton clarified that by board charges he meant internal union executive board charges. (T. 100, 107)

on direct, Licht admitted on cross examination that Nulton may have said about being worried about being brought up on internal union charges.[7] (T. 180, 187, 194) Pray responded no, that was between Nulton and his union. Upon hearing that, Nulton said, "Well, then I'm not going to say anything because I've got to protect myself in the situation and my job. I'm not going to say if it did happen, or if it happened I'm not going to say nothing." (T. 100-101) Pray asked Licht what he could remember about it. Licht said he didn't recall anything either. (T. 101)

Hairston's grievance has still not been resolved. (T. 132)

C. Respondent Whites Out James Wise's Sorter Bid and Fails to File A Grievance

1. The Harrisburg Hub Inside Employees

Under Article 22.2 of the National Master Agreement, there are 75 full-time inside positions at the Harrisburg hub, consisting of sorters, package handlers and shifters/jockeys. Each of the three Article 22.2 positions are paid a different rate but employees in each classification are paid the same rate. All sorters are paid the same rate, regardless of the sorter assignment an employee holds. Similarly, all package handlers are paid the same rate. (T. 23, 55; GCX-3, p. 211-212; JS) Sorters are considered a skilled position and are paid more than package handlers. (T. 21, 26, 202) In the beginning of 2016, a sorter's pay rate was $34.31, a package handler's pay rate was $32.65. (GCX-3, p. 211-212; JS)

The general sorter position at the Harrisburg hub requires the ability to lift 70 pounds on occasion. (T. 23; GCX-5) There is also a small sort general position which encompasses any of the jobs that have to do with the small sort—packages that weigh approximately 10 pounds or less. This includes small sort debaggers, small sort sorters and small sort baggers. Small sort

[7] Licht's affidavit that was given to the Board Agent during the investigation of the charges states "Nulton said that he wouldn't give a statement because then he would get charges filed against him by Monette." (GCX-14, p. 6)

debaggers take packages out of the bags that come through a belt system to the small sort. Small sort sorters sort those packages into bins. Small sort baggers stand on the other side of the bin and put the packages back in the bags and sends them onto the belt. This is considered a package handler position. (T. 24-25, 56; GCX-6; GCX-7)

2. The Annual Bid and Accommodation Process Generally

Pursuant to Article 7, Section the Central Pennsylvania Supplemental Agreement, starting on the third Monday of each year, the 120 inside employees at the Harrisburg hub sign up for sorter, package handler and shifter jobs based on their seniority. (T. 15-16, 17, 21; GCX-3, p. 190-191) The bid happens over two weeks. At the same time, employees pick their vacation. (T. 16) Although not required by the contract, Respondent usually has representatives attend the bidding along with UPS. (T. 145) Higher seniority employees, for the most part, bid for the 75 Article 22.2 permanent jobs available, which pay more, although they can choose to bid on the approximately 45 Article 22.3 positions as well, which are the same classifications, but pay less. (T. 17, 19-20) If an employee bids on a position that he or she is not qualified for, for example because he or she is out on workers compensation, UPS contacts Respondent to talk with Respondent. (T. 35)

Although employees bid on a job classification, UPS has the right to place them in any assignment within that job classification. When the bids are assigned, UPS determines the seniority order and other qualifications to determine who gets what job assignment. (T. 22, 39, 40, 134) An employee who is a package handler, which is considered an unskilled position, can bid on a sorter job, a skilled job. UPS will train the employee on the sort (T. 21, 26, 32)

Wayne Foulke, Labor Relations Manager for UPS, testified that if an employee has an accommodation, he or she can still bid on a job. If an employee bids on a position and the

employee does not get it, the employee can file a grievance. (T. 27, 35) While Foulke conceded on cross-examination that if an employee signs for a position that is beyond his or her physical restrictions of which the company is aware, it is possible that person would not be eligible for that position, he also testified that it is UPS who determines whether the person is qualified and then speaks to Respondent about the situation. It is not Respondent's decision. (T. 30, 33, 35, 40)

Foulke also testified to the process that occurs when an employee has an accommodation. It is initiated by the employee. Sometimes an employee will request accommodation on their own. Sometimes through an interview with an employee, UPS realizes that this employee is giving an indication that he or she may need one. UPS may tell the employee that he or she may need to file for an accommodation. The employee will call into HR for an accommodation. After the request gets received, UPS meets with that employee at a checklist meeting where the parties go through what the employee thinks he or she can do and cannot do and what jobs the employee thinks he or she can and cannot do based on the employee's restrictions. That information gets forwarded onto the region. The region panel determines whether or not this employee qualifies for an ADA agreement. If the region feels that the employee is qualified under the ADA, it gets processed at the region and then it comes back to the center or the district. If needed, the accommodation it can be updated. (T. 36-37)

3. James Wise Complains About Then Business Agent Sholly

James Wise has worked at the Harrisburg facility for 39 years. Currently, he is a small sorts bagger—a package handler in the small sort area. (T. 41, 56) He is fourth or fifth in seniority in the inside jobs at the Harrisburg hub—those jobs filled by package handlers, sorters, and shifters/jockeys. (T. 13, 43, 172) From 2005 to 2009, he was a small sort sorter. (T. 43, 67)

In 1996, Wise received an ADA accommodation because of his back. (T. 50; GCX-9; RX-1) As a result, Wise has limitations on how much and how frequently he can lift. (T. 148; RXC-1) He can lift from 5 to 50 pounds repetitively. (T. 51, 53) Due to his accommodation he works as a small sorts bagger, a package handler position. He currently handles anywhere from 5 to 65 pounds as a bagger but only about 10 to 13 pounds above his head. (T. 51, 67; GCX-9, RX-1) Wise testified that he had the disability accommodation in 2005 to 2009, when he was a small sorter.[8] Wise contends that he would lift less weight as a small sort sorter than he does as a package handler since a small sort sorter lifts only 10 pounds at most. (T. 56)

In February 2015, Wise sent a letter to Thompson, Respondent's new President, concerning a bid over a jockey (or shifter) position. (GCX-8) In the letter, Wise complained that Sholly, who was a Business Agent at the time, had misled him to sign a package handler bid and had failed to mention anything about a jockey bid that Wise had wanted to bid asserting that Sholly had reserved the jockey bid for another employee. (T. 48-49, 141; GCX-8) Thompson and Sholly called Wise to discuss his letter but Wise was unable to talk at the time. Wise did not call Thompson back. Nor did Thompson make any other effort to reach Wise. (T. 49, 143)

4. Wise's 2016 Annual Bid Is Whited Out By Shop Steward Sholly

On the first day of the annual bid in January 2016,[9] a Monday, Wise bid on a sorter position. His bid was on the fifth line of the bid. (T. 43; GCX-5) The bid was held in the twilight office. At the time he bid on the position, there was only a supervisor present. No shop steward

[8] Respondent asserted that Wise never performed the small sort sorter position in its opening statement. (T. 112) In support of this, Sholly testified that there was a grievance filed in 2011 about by Wise about not being paid the sorter rate which was resolved against Wise because he was not doing the sorter position. (T. 147) However, Respondent failed to present the grievance, which was a document in its possession. Sholly's testimony on this point should not be credited.

[9] The annual bid is supposed to start on the third Monday of January, which would have made it January 18, 2016. (T. 16) According to Wise, because of snow on that date, it was pushed off to the following week, which would have made it January 25, 2016. (T. 57)

was there at the time. (T. 43) Wise bid on the sorter position because he had done the position before and it had a higher rate of pay than a package handler position. (T. --)

The next day, the second day of bidding, Sholly, who was a shop steward at that time, went into the bidding area. He had not attended the previous day due to snow. He saw that Wise bid on a sorter position. (T. 145) Sholly then whited out Wise's name and put Wise's name in the "correct spot he was supposed to be"—a package handler position on line 61.[10] (T. 44, 146; GCX-4) As noted by Respondent's President, Edgar Thompson, he did not know of any other circumstance at UPS where an employee's name was whited out from a bid. (T. 134) Sholly testified that he whited out Wise's name because Wise had an ADA accommodation that limited him to a bagger position in small sort.[11] (T. 146; RX-1) He knew about Wise's accommodation from a grievance filed on Wise's behalf in 2011 about not being paid a sorter rate. (T. 146) Sholly admitted on cross examination that he did not know if anything had changed with Wise's accommodation or whether Wise was able to do the job of a sorter. He also admitted that he did not reach out to Wise before changing his bid. (T. 156-157) He also admitted on cross examination that it was management's role to determine who fills the job of a sorter. (T. 157)

Wise identified four individuals at the Harrisburg small sort department who he works with—George Ofak, Bonnie Kauffman, Joe Walsh, and Ron Stambaugh.[12] (T. 69, 153-154) Of the employees in small sort, two have an ADA accommodation—Wise and Ofak, who is missing

[10] Sholly testified that he did this with the Employer's supervisor Rick Kane's assent. (T. 145-146) This testimony should not be credited. Sholly was not a credible witness. The "position statement" from Respondent provided during the investigation makes no mention of any Employer involvement or assent. (GCX-14)

[11] George Ofak, who received an ADA accommodation in April 2016, and was placed in a small sort bagger position—a package handler position, bid on a sorter position. His name was not whited out. (T. 154; GCX-5; GCX-16(a)-(b))

[12] Wise testified that he worked with five individuals in small sorts but only gave the names of four. (T. 68) A fifth employee, Heidi Kerstetter, was named in GCX-16(a).

part of an arm.[13] (T. 50, 154; GCX-9; GCX-16(a); GCX-16(b); RXC-1) Kauffman started the ADA accommodation process in 2014 but never completed it. (GCX-16(c)-(d)) Ofak, Kauffman, Walsh, and Stambaugh bid for sorter positions on the annual bid.[14] (GCX-4) Kauffman, Walsh, and Stambaugh are sorters and paid the sorter rate. (GCX-16(a); JS) In April 2016, Ofak reached an ADA accommodation and became a small sort bagger. Ofak was paid the sorter rate but should have been paid the package handler rate. (GCX-16(a))

That night, Stambaugh told Wise that his name was whited out on the bid sheet.[15] (T. 43-44, 57) The following day, between 4:00 and 4:30 p.m., during the bidding process, Wise went to the twilight office to confront Sholly. Wise told him that he had not signed for a package handler position.[16] (T. 45, 58) Sholly responded, "This mother fucker is always getting in my way."[17] (T. 46) Licht was also present in the twilight office. Wise walked out for a few minutes. When Wise came back in he said, "This has been going on since 2009." (T. 45, 58) Wise was referring to the loss of his sorter position in 2009, which he had felt was out of his hands. (T. 59) Dave Licht said something about backpay and said "We should grieve this."[18] (T. 45)

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[13] Wise testified that the employees he worked with in small sorts either had ADA accommodations or some type of physical problem. (T. 68-69) Wise was correct that at least one of them did have an accommodation. (GCX-16(a))

[14] Joe Walsh signed on line 15; Ron Stambaugh on line 20; Bonnie Kauffman on line 43; and George Ofak on line 48. (GCX-4)

[15] Wise identified Robert Standaugh as his co-worker. However, the bid sheet shows the name of his co-worker to be Ron Stambaugh on line 20. (T. 43, 57: GCX-4)

[16] Sholly's testimony that Wise came in yelling that Sholly changed his bid and that Wise was loud, should not be credited. (T. 145) When asked specifically on cross, Licht who was present, denied that Wise was yelling or that he heard him shouting. (T. 200)

[17] Wise testified that he believed the comment made by Sholly had to do with the letter that Wise sent to the Thompson in February 2015 concerning a bid over a jockey (or shifter) position. (T. 48-49; GCX-8) Sholly denied making this statement. He claims he told Wise, "James, you get paid for the job you do." (T. 149-150) As Wise was trying to get a sorter position, a higher paid position, this statement makes no sense.

[18] Licht denied making these statements. He stated that he told Wise that if he felt his rights were violated he certainly has the opportunity to file a grievance. (T. 169) Sholly testified that neither he nor Licht offered to file a grievance on Wise's behalf. (T. 150-151)

Wise asked Licht to step outside for a minute.[19] Licht did. Licht said, "If it's a dollar raise you want, I can get you the dollar." Wise said, "Well, it's $1.44." They discussed it a bit more. They then walked back into the twilight office.[20] Licht asked Sholly how much more does a sorter get. Sholly told him $1.44 an hour.[21] After that, Wise believed they were going to file a grievance on his behalf so Wise shook hands with Sholly and left. (T. 45)[22]

Wise continued to believe that Respondent was going to file a grievance on his behalf as about a day later, Sholly came up to where Wise was working in small sort and said, "We're going to grieve this." About a week later, Sholly came up to Wise in the lunch room. Again he told Wise, "We're going to grieve it."[23] (T. 47)

Respondent never filed a grievance on behalf of Wise. (T. 48, 152)

According to Licht, he received proof of Wise's ADA accommodation from UPS a few days after the incident in the twilight office. (T. 167; RX-1) Thompson testified that he thought it was appropriate for Sholly to white out Wise's name on the bid because Wise bid on a position that he was not qualified to hold. (T. 119-120)

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[19] According to Licht, Wise came over to him and asked him if he could speak to him outside. Wise told him that Sholly had crossed his name off and moved it to a different bid. Wise asked Licht if he knew about it. Licht told Wise this was the first that he had heard about it. (T. 165) While somewhat different than what Wise testified to, this does not contradict the essence of Wise's testimony.

[20] According to Licht, Sholly explained that he whited out Wise's name because of Wise's ADA accommodation. Licht explained that this was the first that he had heard about it. (T. 166) According to Licht, when they stepped back in to the twilight office, he asked the Employer's representative who was there if Wise had an accommodation and he was told yes. He then asked for proof. (T. 166) This contradicts the "position statement" provided by Respondent during the investigation. (GCX-15) Nor did Sholly testify to this.

[21] Sholly did not recall any discussion about the difference in the sorter rate to package handler rate. (T. 151) However, given his own comments about telling Wise that he only gets paid for what he does, this does not ring true.

[22] According to Sholly, he and Licht never offered to file a grievance. They told Wise, "You get paid for the job you do." (T. 150)

[23] Sholly's testimony is that Wise approached him in the lunch room and asked "Am I going to get the sorter rate?" He responded, "You need to call Dave Licht down at the union hall." (T. 152)

IV. ARGUMENT

A. Credibility.

The Board accords significant weight to the credibility determinations of administrative law judges because they actually see and hear witnesses when testifying. See *Medeco Security Locks*, 322 NLRB 664, 664 (1996) ("[C]redibility is a function not only of what a witness says but of how a witness says it.") (citation omitted). The judge may consider "[a]ll aspects of the witness's demeanor" in evaluating truthfulness, "including the expression of [the witness's] countenance, how he sits or stands, whether he is inordinately nervous, his coloration during examination, the modulation or pace of his speech and other non-verbal communication." *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996) (quoting *Penasquitos Village v. NLRB*, 565 F.2d 1074, 1078-79 (9th Cir. 1977)).

For purposes of resolving credibility issues, the ALJ may properly consider whether the act of voluntarily testifying in a Board proceeding potentially endangers the witness's economic well-being. The Board has long applied this principle to employees testifying against their current employers. *See, e.g., Gold Standard Enterprises, Inc.*, 234 NLRB 618, 619 (1978) ("[T]he testimony of a witness [who is in respondent's employ at the time of a hearing] is apt to be particularly reliable, inasmuch as the witness is testifying adversely to his or her pecuniary interest, a risk not lightly undertaken."); *Shop-Rite Supermarket*, 231 NLRB 500, 505 n. 22 (1977) (observing that employee testimony that is adverse to the employer is "given at considerable risk of economic reprisal, including loss of employment . . . and for this reason not likely to be false."). This logic is also applicable—at least to some extent—to witnesses who testify to their potential detriment against their own union. See, e.g., *Iron Workers Union Local No. 378 (N.E. Carlson Construction)*, 302 NLRB 200, 205 (1991) (finding witness credible

"because as a union member and shop steward, he was testifying against union solidarity and his own self-interest" by testifying against the union's business agent); *Machinists District 751 (Boeing Co.)*, 270 NLRB 1059, 1060 (1984) (finding indicium of reliability in witness's status as bargaining-unit member who had nothing to gain from testifying against his own union).

1. General Counsel's Witnesses Were Credible

The undersigned respectfully submits that the testimony of the General Counsel's witnesses, and not the testimony of Respondent's witnesses, be credited. Wayne Foulke, a labor relations manager for UPS, was a disinterested witness in this proceeding. He testified on behalf of the General Counsel pursuant to a subpoena. (T. 11) He had nothing to gain from testifying. He answered questions thoughtfully and in a candid, frank, and forthright manner.

Jason Nulton testified for the General Counsel because he was subpoenaed. (T. 92) Nulton had excellent recall of what happened during Licht's conversations with him and held up rather well during cross-examination. His testimony was internally consistent and was backed up by Respondent witness Licht's admissions on cross-examination. Considering that Nulton is not a Charging Party in this case and does not stand to gain anything from testifying, the ALJ may rightfully weigh the risks that he undertook, by testifying against his Union, in assessing his credibility. Furthermore, both Nulton and Foulke were sequestered witnesses and did not hear any other witnesses' testimony.

While both Charging Party Hairston and Charging Party Wise were present during the entire hearing, their testimony did not overlap. Thus, their testimony was not affected by hearing other testimony. Hairston's demeanor on the stand instilled confidence in his veracity. Although he is a Charging Party, none of the Complaint allegations directly involve him. Hairston's

testimony in support of his own charge against Respondent added to his credibility as a witness. His testimony was, all in all, thorough, firm, and convincing.

Charging Party Wise was also a highly credible witness. He was consistent throughout his testimony about the statements that Licht and Sholly made to him. He offered a credible account of the events of what occurred when he confronted Sholly about his name being whited out. Wise acknowledged that he has a disability accommodation for his back and did not attempt to hide it. He truthfully acknowledged his limitations. Wise's testimony against Respondent, his own union, gives even more credence to his credibility.

2. Respondent's Witnesses Should Not Be Credited Over General Counsel's Witnesses

Edgar Thompson, David Licht and Robert Sholly testified on behalf of Respondent. Their testimony often was self-serving and unbelievable. They were hardly disinterested witnesses.

Sholly was not a credible or reliable witness. Sholly's testimony as to what occurred when Wise came into the twilight office is different in certain critical respects from Respondent's other witness, Licht, who was present at the time. Specifically, his contention that Wise was yelling and loud when he confronted Sholly over changing his bid was not corroborated by Licht. (T. 149, 200) Where a witness's testimony is uncorroborated, the trier of fact may discredit the witness's testimony. See *Big Ridge Inc*., 358 NLRB 1006, 1007, n. 3 (2012) (finding corroboration of testimony to be a relevant and appropriate factor in determining credibility). Furthermore, parts of Sholly's testimony where he testified that he told Wise that "you get paid for the job you do," frankly do not make sense in the context of the conversation reported. (T. 149, 150) Nor did Licht testify to that. Moreover, his testimony that UPS helped in

whiting out Wise's name with him was frankly incredible. Respondent's own "position statement" during the unfair labor practice investigation makes no mention of UPS's involvement in whiting out Wise's name; clearly a very salient fact which, if true, could have been a defense to the charge. (GCX-14) Indeed, a negative inference should be drawn from Respondent's failure to call the UPS supervisor as a witness to support its claim that UPS agreed to removing Wise's name from the sorter bid. *Daikichi Sushi,* 335 NLRB 622 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); *International Automated Machines,* 285 NLRB 1122, 1122-1123 (1987), enfd. mem. 861 F.2d 720 (6th Cir. 1988). Sholly's testimony that he knew all about Wise's ADA accommodation but somehow was not aware of any other employee's accommodation speaks volumes about Sholly's attitude towards Wise. (T. 157)

Licht was also not a credible witness. With regard to his testimony concerning Wise, while Licht testified that Sholly told him he whited out Wise's name with the help of UPS, Respondent's "position statement" given during the investigation of the charge makes no reference to UPS being part of the decision to white out Wise's name:[24] (T. 166; GCX-15)

> MR. Wise signed his name by a sorter position and the next day Sholly discovered this and moved Wise to a package handler slot, because MR. Wise has an accommodation that he can only be a bagger. Steward Sholly discovered this the next day and thought that MR. Wise just signed the wrong spot on the bid sheet. I came in the next day to see how the bidding was going on and MR. Wise walked in and started stating that "Sholly changed my bid". I stated to Wise ok let's see what's going on. I then asked Sholly if he could explain this to me. Sholly stated that the company had MR. Wise bagging for several years because Wise has an ADA accommodation preventing him from being a sorter. Sholly and I asked MR. Wise why he signed the sorter bid and MR. Wise stated that he just wanted the extra pay that a sorter receives, we then informed MR. Wise that he is a bagger and you don't get the sort rate as a bagger per article 55 in the CBA. (GCX-15)

[24] Parts of Respondent's "position statement" appear to be a first person responses from Licht, as shown in the portion reproduced below. During cross-examination Licht distanced himself from the position statement saying he did not believe he wrote GCX-15. (T. 198)

Interestingly, the "position statement" is different from both Licht's and Sholly's testimony regarding what happened as neither testified to asking Wise why he had signed the sorter bid.

Likewise, Licht gave incredible evidence when he spoke about the relationship between Hairston and Monette. Licht attempted to paint a friendly relationship between Monette and Hairston, knowing full well that Hairston had filed a number of grievances against Monette alleging racial harassment, including one processed by Licht, and that Monette had even been disciplined by UPS for his harassment of Hairston. Similarly, Licht contradicted himself as to whether he heard Nulton say anything at the meeting with Pray about Nulton's concern that Respondent might retaliate against him by the filing of internal union executive board charges. During his direct testimony Licht stated that he did not recall Nulton asking for "amnesty regarding any future issues that might arise with the union." (T. 188) On cross examination, when confronted with his affidavit given during the investigation of the charges, Licht was quick to change his testimony to acknowledge that during the meeting with Pray, Nulton may have said that he was worried about being brought up on internal union charges. (T. 188, 194; GCX-14)

Thompson's testimony was also not credible when discussing the internal charges filed by Hairston against Monette. While knowing that the internal charges involved Monette calling Hairston names, Thompson denied any knowledge of whether there was any race based concerns with respect to the name calling. (T. 127, 129) Thompson also testified rather incredibly regarding Wise's situation that he did not know if there is a process that UPS follows when there is a medical accommodation where UPS finds positions for employees to work with the accommodation. (T. 138)

B. Respondent Threatened Jason Nulton with Internal Union Charges if Nulton Acted as a Witness in Connection with Charging Party Henry Hairston's July 15, 2015 Grievance Alleging Racial Harassment by Respondent's Shop Steward Monette, in Violation of Section 8(b)(1)(A) of the Act. (Consolidated Complaint Paragraphs 5(c) and 6.)

In *Graphic Communications Local 388M (Georgia Pacific Corp.),* 300 NLRB 1071,1072-1073 (1990), the Board held that a union violates Section 8(b)(1)(A) by disciplining members for appearing and testifying in arbitration proceedings in a manner contrary to the interests of other employees--unless the union has objective evidence of perjury. In *Office Employees Local 251 (Sandia National Laboratories),* 331 NLRB 1417, 1418-1419 (2001), the Board explained that the scope of 8(b)(1)(A), in union discipline cases, "is to proscribe union conduct against union members that impacts on the employment relationship, impairs access to the Board's processes, pertains to unacceptable methods of union coercion, such as physical violence in organizational or strike contexts, or otherwise impairs policies imbedded in the Act." See also *International Brotherhood of Teamsters, Local 992 (UPS Ground Freight, Inc.),* 362 NLRB No. 64, n. 1 (2015). See also *Auto Workers UAW Local 1989 (Caterpillar Tractor),* 249 NLRB 922, 923 (1980); *Freight Drivers and Helpers Local Union No. 557 (Liberty Transfer Company),* 218 NLRB 1117, 1120 (1975).

In *International Brotherhood of Teamsters, Local 992 (UPS Ground Freight, Inc.),* supra, a case very similar to the one here, the union's Business Agent approached an employee, who was a former union steward, right before a scheduled arbitration session and advised him that internal charges might be filed against him if he testified for the employer. The Board affirmed the ALJ's decision that the union violated Section 8(b)(1)(A) of the Act by telling the employee that he could be brought up on internal union charges for testifying against another employee because the statement impaired an essential feature of national labor policy. In doing so, the

Board noted that "grievance and arbitration procedures are a fundamental component of national labor policy. …. It is essential to the existence of the arbitration process that witnesses testify before the arbitrator without fear of reprisal from either the employer or the union." Id., quoting *Teamsters Local 788 (San Juan Islands Cannery)*, 190 NLRB 24, 27 (1971). See also *Graphic Communications Local 388M (Georgia Pacific Corp.)*, supra at 1072-1073.

Here, Licht's threats to Nulton, telephonically and right before the meeting with Pray, that internal charges might be filed against Nulton if he acted as a witness for Hairston's grievances against shop steward Monette, clearly impaired policies imbedded in the Act. Licht's threats to Nulton had the effect of impairing Hairston's access to the grievance and arbitration procedure. By making the threats to Nulton about filing of internal union charges if he provided corroboration for Hairston's grievance to UPS, Licht made clear to Nulton that Respondent might retaliate against him.[25] Licht did not say it once but several times, the last time right before Nulton met with Pray, UPS's labor manager. Moreover, Nulton was affected. He chose not to give a statement to Pray in support of Hairston's grievance rather than risk internal union charges. In these circumstances, Respondent should be found to have violated Section 8(b)(1)(A) by David Licht's statements to Nulton that he could face internal union charges if he gave a statement to Pray in support of Hairston's grievance.

[25] It might be added that by corroborating Hairston's version of events, Nulton would not only provide evidence to support Hairston's claim that shop steward Monette was harassing Hairston but would also make Licht look bad. Licht, after all, was the one who went out of his way to tell Nulton what Monette had said he heard Hairston and Maslach saying, knowing full well, despite his disclaimers, that there was bad blood between Monette and Hairston. So it is convenient that Licht would not want Nulton to provide a statement.

C. Respondent Unlawfully Whited Out Wise's Name From The Sorter Position On The Annual Bid in Violation of Section 8(b)(1)(A) and (2) of the Act. (Consolidated Complaint Paragraphs 5(d), (e), (j), (k), 6 and 7).

1. GCX-16(a)-(e) and the Joint Stipulation Should Be Received Into Evidence

As a preliminary matter, Counsel for the General Counsel respectfully requests that Your Honor receive and admit GCX-16(a)-(e) and the Joint Stipulation into evidence. Based on testimony by Charging Party Wise at the hearing that other employees in the small sort area had accommodations or physical disabilities, Your Honor requested the information encompassed by GCX-16(a)-(e). Counsel for the General Counsel obtained the information as directed from UPS, a neutral party to this proceeding. In Respondent's March 10, 2017 email objections to the admission to GCX-16, Respondent has apparently not objected to the receipt of GCX-16(a) and portions of GCX-16(c).[26] Respondent's objections to the remaining documents in GCX-16(b)-(e) as somehow inauthentic are without merit. There is no reason that the documents presented as GCX-16(b)-(e) would be inauthentic or other than as represented by UPS in GCX-16(a). UPS has no motivation to present any inauthentic documents. Nor has Respondent alleged any bias on the part of UPS. Furthermore, as shown below, the evidence in GCX-16 supports the Consolidated Complaint allegations in paragraphs 5(d), (e), (j), and (k), pertaining to Charging Party Wise as it goes to disparate treatment by Respondent against Wise. Moreover, as all the parties agreed to the Joint Stipulation there is no reason not to receive it into evidence. Accordingly, Counsel for the general Counsel respectfully requests that GCX-16(a)-(e) and the Joint Stipulation be received into evidence.

[26] While generally objecting to the admission of GCX-16, Respondent's attorney wrote: "We do not object to proposed GCX 16 (a), the transmittal letter from Mr. Tocci to Ms. Alvo-Sadiky and we do not object to the portion of proposed GCX 16 (c) that describes the "Physical Demand Assessment" associated with the listed job classifications on those two pages that are each dated, "8/27/13" and numerated as "-35-" and "-36-" respectively."

2. The Legal Standard

A union breaches its duty of fair representation "when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). Demonstration of bad faith requires proof of fraud or deceitful or dishonest action. *Steel Workers (Cequent Towing Products)*, 357 NLRB 516, 517 n. 6 (2011) (citing *Electrical Workers v. NLRB*, 41 F.3d 1532, 1537 (D.C. Cir. 1994)).

Section 8(b)(2) prohibits a union directly or through its agents from causing or attempting to cause an employer to discriminate against an employee in regard to any term or condition of employment in violation of Section 8(a)(3) of the Act. A union which causes an employer to discriminate against an employee presumptively breaches its fair duty of representation. See *Acklin Stamping*, 351 NLRB 1263, 1263 (2007). To determine whether Union conduct violates 8(b)(2), the Board has applied both the duty of fair representation standard and the analytical framework established in *Wright Line* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir.1981), *cert. denied* 455 U.S. 989 (1982). See, e.g., *Caravan Knight Facilities Mgmt., Inc.*, 362 NLRB No. 196, slip op at 4 (2015) enf. den. on other grounds 844 F.3d 590 (6th Cir. (2016); *Good Samaritan Medical Center*, 361 NLRB No. 145, slip op. at 2 (2014). It is not necessary to find that a union has violated both standards in order to find a violation. See *Machinists District 70 (Spirit Aerosystems)*, 363 NLRB No. 165, slip op at 1, n. 3 (2016); *Good Samaritan Medical Center*, supra. A derivative violation of Section 8(b)(1)(A) also arises where an 8(b)(2) violation has been proven. *Security, Police & Fire Professionals (SPFPA) Local 444*, 360 NLRB 430, 435 (2014). The reason is that the union's causation of an employee's change in terms and conditions of employment necessarily constitutes restraint and coercion of the employee's

exercise of his Section 7 rights. Id., citing *Town & Country Supermarkets*, 340 NLRB 1410, 1411 (2004); *Postal Workers*, 350 NLRB 219, 222 (2007).

Under the duty-of-fair-representation standard, whenever a labor organization causes the discrimination of an employee, there is a rebuttable presumption that it acted unlawfully because by such conduct it "demonstrates its power to affect the employees' livelihood in so dramatic a way as to encourage union membership among the employees." *Graphic Communications Workers Local 1-M (Bang Printing)*, 337 NLRB 662, 673 (2002), quoting *Operating Engineers Local 478 (Stone & Webster)*, 271 NLRB 1382 n. 2 (1984). A union may rebut the presumption that it acted unlawfully in doing so by "showing that its action 'was necessary to the effective performance of its function of representing its constituency.'" *Acklin Stamping*, supra, 351 NLRB at 1263, quoting *Graphic Communications Workers Local 1-M (Bang Printing)*, supra. See also *Operating Engineers Local 18 (Ohio Contractors Assn.)*, 204 NLRB 681 (1973), enf. denied on other grounds 555 F.2d 552 (6th Cir. 1977). The Board has also stated that the union may rebut the presumption by showing that its actions were "done in good faith, based on rational considerations, and were linked in some way to its need effectively to represent its constituency as a whole." *Plasterers, Local 299 (Wyoming Contractors Assn.)*, 257 NLRB 1386, 1395 (1981). See also *Machinists District 70 (Spirit Aerosystems)*, supra, 363 NLRB slip op at 1, n. 3.

Under the *Wright Line* analysis, the General Counsel must prove, by a preponderance of the evidence, that the employee engaged in activity protected by the Act, that the union was aware of the employee's protected activity and that the union was motivated by animus against the protected activity in taking adverse action against the employee. If the General Counsel meets this burden, the burden shifts to the union to show, again by a preponderance of the

evidence, that the same action would have been taken against the employee even in the absence of protected activity. See *Security, Police & Fire Professionals (SPFPA) Local 444*, supra, 360 NLRB at 435; *Town and Country Supermarkets*, supra, 340 NLRB at 1411 (Board found violation where the union reported a threat as a pretext to purge the bargaining unit of a vocal opponent to the union president's administration of the union); *Good Samaritan Medical Center*, supra, 361 NLRB No. 145, slip op. at 2.

3. Respondent's Actions Were Unlawful

There is no dispute that Sholly, Respondent's agent here, took it upon himself to white out Wise's name from a sorter position on the 2016 annual bid and to replace his name in a package handler position.[27] He did this without checking with Wise, without knowing if anything had changed with Wise's accommodation or whether Wise was able to do the job of a sorter. Because Respondent changed Wise's job bid, he was not considered for a sorter position. Sholly's actions were then ratified by Licht and later Thompson. Respondent's witnesses admitted that it is UPS who makes the determination whether someone is qualified for a position. It is not Respondent's role. However, Respondent took it upon itself to do so.

Moreover, Respondent made no effort to rectify its mistake after Wise clearly put Respondent on notice that he wanted to be considered for the sorter position. Instead, Respondent openly demonstrated its animus to Wise by Sholly's comment, "this mother fucker is always getting in my way." While we do not know exactly what Sholly meant by his comment,

[27] Although Respondent's Answer denied that Sholly was an agent, Sholly was acting in his role as elected shop steward at the annual bid when he whited out Wise's name. (GCX-1((r)) The Board regularly finds elected or appointed union officials to be agents of a union. See, e.g., *Caravan Knight Facilities Mgmt., Inc.*, supra, 362 NLRB No. 196, slip op at 3; *Security, Police and Fire Professionals of America (SPFPA) Local 444 (Security Support Services)*, supra, 360 NLRB at 430, n. 2; *Penn Yan Express*, 274 NLRB 449 (1985); *IBEW Local 453 (National Electrical Contractors Assn.)*, 258 NLRB 1427, 1428 (1981), enfd. mem. 696 F.2d 999 (8th Cir. 1982).

the evidence disclosed that Wise complained to the Respondent's President about Sholly a year earlier. Notably, Wise's complaint related to the annual job bid and the Union steward giving preferential treatment in bids to others. Even after Wise sought an explanation from Respondent as to why his name had been whited out, according to Respondent's own version of events, Sholly summarily informed him that he was ineligible for that position. Thus, Respondent's action in whiting out Wise's name from the annual bid demonstrated its power to affect Wise's livelihood. Furthermore, Sholly's comment combined with the evidence that Respondent then mislead Wise that it would file a grievance on his behalf, is sufficient evidence that Respondent's action towards Wise was influenced by its hostility towards him. Accordingly, under either the duty of fair representation standard or the *Wright Line* analysis, the General Counsel has presented a preponderance of evidence to show that Respondent acted unlawfully in violation of Section 8(b)(2) and derivatively Section 8(b)(1)(A).

Nor has Respondent successfully rebutted either the duty of fair representation standard or the *Wright Line* analysis. Although Respondent asserted in its opening statement that its actions were necessary to the effective performance of its function of representing its constituency, it presented no evidence in support of that contention. *Operating Engineers Local 478 (Stone & Webster),* supra, 271 NLRB at 1385. It was not reasonable for Respondent to change Wise's job bid when his bid was carried out in accordance with the procedures of the annual bid. While Respondent asserts that Wise was ineligible to bid on the sorter position because of his ADA accommodation which limited him to a small sort bagger, a package handler position, UPS's ADA accommodation process would allow Wise to bid on a different position if he could show that he was able to do the work. While Wise admitted that he was not able to lift 70 pounds required for a general sorter position, Wise has performed the small sort sorter

position in the past and convincingly stated that he is able to perform the functions of a small sorter. The weight requirements for that position are less than that of his current position. Moreover, if UPS were to have found that Wise was not qualified it would have conferred with Respondent and Wise as to the appropriate action, including discussing with Wise whether his accommodation might need to be changed.

While acknowledging that Wise's seniority would allow him to bid on any position, Respondent insinuated that Wise was also not able to bid on a sorter position because he is not qualified as an unskilled package handler. UPS testified that being a package handler, an unskilled position, did not disqualify Wise from applying to become a sorter, a skilled position, as UPS trains employees who are otherwise qualified to bid on skilled positions. Respondent provided no evidence that if Wise would have been allowed to bid on a sorter position that someone else in the unit would be disenfranchised from a position that they were entitled to receive under the collective bargaining agreement. Thus, Respondent failed to show that it changed Wise's job bid to represent the interests of its constituency.

Respondent has also not prevailed in its defense is that it changed Wise's job bid not in response to Wise's protected activity or ill will towards Wise, but rather due to Wise having an accommodation that prevents him from being a sorter. As shown above with regard to the duty of fair representation standard, Respondent's argument is weak. While it is not disputed that Wise has an accommodation that currently puts him in a small sort bagger position, a package handler position, the evidence does not suggest that Respondent would have whited out his name, absent Respondent's animus towards Wise. First, as Wayne Foulke testified other employees have bid on positions that they were not necessarily qualified for because they were out on workers compensation. (T. 35) Respondent does not white out their names. Instead UPS

contacts Respondent to discuss what should be done. Second, the record discloses that, George Ofak, another employee in the small sort section who is missing a portion of his arm, bid on a sorter position at the 2016 annual bid. Less than three months later, Ofak received an accommodation as a small sort bagger—the same position that Wise holds. Sholly certainly knew of Ofak's disability at the time of the bid as he testified that Ofak was missing a portion of his arm. While it is unclear from the record as to whether Ofak was in the process of getting an accommodation at the time of the annual bid or started the process shortly after as a result of his bid, Sholly certainly did not white out Ofak's name from a sorter position on the bid. Third, the record evidence shows that UPS has not maintained that it will only consider employees who can only perform all the functions of sorting. Respondent's action of whiting out Wise's name, caused him to lose the opportunity to become a small sort sorter, a job for which he might well have been qualified.

Respondent has not presented any reasonable explanation for its actions. We are left with the inference that it intended for UPS not to consider Wise for the sorter position. Respondent's lack of concern over Sholly's decision to white out Wise's name on the bid sheet, failure to follow up with Wise before and after whiting out his name, and Sholly's statement that "this mother fucker was always getting in the way," suggest that it removed his name from the bid list in order to retaliate against him for his complaints about Sholly's handling of the bid procedures and favoritism the prior year. Although Respondent denied that it had any animus towards Wise, the only employee whose name has been whited out during the annual bid has been Wise's. Indeed, Thompson knew of no other employee who has had his name whited out from the annual bid.

Although much of the testimony at the hearing concerned whether Wise would have been able to perform the sorter position at the time he put in his bid, this is actually irrelevant. It was admittedly not up to Respondent to determine whether Wise was qualified for the sorter position. This was a decision for UPS to determine. Had Respondent allowed Wise to bid on the sorter position, it would have been UPS who determined whether Wise was actually able to perform as a sorter, and, no unfair labor practice would have occurred. Indeed, UPS would have informed Respondent if there was an issue with Wise bidding so that Wise would have been able to have the protections of the collective bargaining agreement and UPS' ADA accommodation process, including seeking a revision to his accommodation if necessary. In this regard, Wayne Foulke, UPS's labor relations manager testified that, "[s]ometimes through an interview with an employee, we realize that this employee is giving us indication that they may need [an accommodation]. We may tell them, look, if this is what you're looking to do, you may need to file for an accommodation." (T. 36) Here, because of Respondent's arbitrary and retaliatory conduct, Wise's name was whited out and he was not given an opportunity to bid on the sorter position.

Based on the above, Respondent violated Section 8(b)(1)(A) and 8(b)(2) of the Act by causing UPS to discriminate against Wise when it removed Wise's name from a sorter position on the bid sheet.

D. Respondent Unlawfully Failed and Refused to File a Grievance on Wise's Behalf, in Violation of Section 8(b)(1)(A) of the Act. (Consolidated Complaint Paragraphs 5(f)-(j) and 6)

Under *Vaca v. Sipes*, supra, the Union violates its duty of fair representation if it decides not to pursue a grievance based on arbitrary, discriminatory or bad faith considerations. A union's actions are considered arbitrary only if the union has acted "so far outside 'a wide range

of reasonableness' as to be irrational." See *Air Line Pilots Assn. v. O'Neill*, 499 U.S. 65, 67 (1991) (quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). See *Glass Bottle Blowers Local 106 (Owens-Illinois, Inc.),* 240 NLRB 324, 324-325 (1979) (invidious motivation apparent from expressions of hostility by union officials, perfunctory investigation of grievance and agreement with employer's position instead of presenting charging party's position); *Groves-Granite*, 229 NLRB 56, 63 (1977) (violation where Union refused to process a grievance because of personal animosity). Mere negligence is insufficient to constitute arbitrary conduct and no violation will be found. *Amalgamated Transit Local 1498 (Jefferson Partners, LP)*, 360 NLRB 777, 778 (2014); *Teamsters Local 692 (Great Western Unifreight),* 209 NLRB 446, 447-448 (1974).

Once a Union agrees to process a grievance but decides to abandon the grievance short of arbitration, the finding of a violation turns not on the merits of the grievances but on whether the Union's disposition of the grievance was perfunctory or motivated by ill will or other invidious considerations. *Glass Bottle Blowers Local 106 (Owens-Illinois, Inc.),* supra. Perfunctory or careless grievance handling constitutes arbitrary conduct, not mere negligence, and is, therefore, violative of the Act. See e.g., *Service Employees Local 3036 (Linden Maintenance*), 280 NLRB 995 (1986) (assuring employee union would take care of grievance, but then abandoning it without explanation and without informing grievant); *Union of Sec. Personnel of Hospitals*, 267 NLRB 974, 980 (1983) (union abandoned grievance and conducted no investigation after initial discussion with grievant); *Retail Clerks Local 324 (Fed Mart Stores),* 261 NLRB 1086 n. 2 (1982) (purposefully misinforming, or keeping uninformed, a grievant regarding status of grievance after commitment to seek arbitration); *U.S. Postal Service*, 240 NLRB 1198, 1199 (1979) (contrary to established policy, revoking without reason earlier approval of employee's

reassignment request); *Newport News Shipbuilding & Dry Dock*, 236 NLRB 1470, 1471 (1978) (relying almost solely upon employer's explanation with little additional investigation).

The evidence shows that Respondent's actions in not filing a grievance rose to the level of a violation of its duty of fair representation to Wise. Respondent acted in bad faith when it failed to file a grievance on Wise's behalf despite its assurances that it would do so. In the twilight office, Licht informed Wise that Respondent would file a grievance on his behalf. A day later, Sholly came up to where Wise was working in small sort and said, "We're going to grieve this." About a week later, Sholly came up to Wise in the lunch room and reassured Wise that "We're going to grieve it." Indeed, even under Sholly's version of what happened in the lunchroom, it was understood by Respondent that Wise was still seeking the sorter position. Based on what Licht and Sholly told him, Wise he thought Respondent would file a grievance on his behalf. There is no dispute that Respondent did not then or ever file a grievance on Wise's behalf.

The fact that Wise did not initiate the grievance directly is not fatal to the finding of a duty of fair violation here. It should be noted that when discussing the grievance procedure both UPS and Respondent spoke about the shop steward or business agent filing the grievance. (T. 14-15; 117) Wise was not required to specifically request that Respondent file a grievances for him when the circumstances of the communication between Wise and Respondent otherwise established that it was Wise's desire that a grievance be filed over the failure to get a sorter position—the job he bid for. There are no magic words required. In this case, Wise's desires were clear and it appears that Respondent and Wise understood that the filing of a grievance was the only means for UPS to consider Wise for the sorter position since Respondent had removed his name from the bid. Respondent was the cause of Wise's removal from the bid list to begin

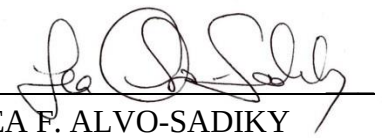
with, and then told him several times that it would pursue the matter for him by filing a grievance yet inexplicably failed to do so. Respondent's bad faith towards Wise is evident from its entire interaction with him. *Service Employees Local 3036 (Linden Maintenance*), supra; *Groves-Granite,* supra. Respondent's failure to file a grievance leaves its hostility towards Wise as the unchallenged reason for its actions, thereby showing Respondent acted in a discriminatory and bad faith manner. Accordingly, Respondent breached its duty of fair representation towards Wise in violation of Section 8(b)(1)(A) of the Act.

V. CONCLUSION AND REMEDY

On the basis of the record as a whole and the applicable law discussed herein, it is respectfully submitted that Your Honor find that Respondent violated Section 8(b)(1)(A) of the Act by threatening an employee of UPS with internal union charges for giving a statement in support of another employee's grievance against a shop steward; that Respondent violated Section 8(b)(1)(A) and (2) of the Act by whiting out Wise's sorter bid and replacing it with a package handler bid that made less money; and that Respondent violated Section 8(b)(1)(A) of the Act by failing to file and process a grievance on behalf of Wise over the whiting out of his sorter bid. Counsel for the General Counsel asks that your Order include any relief you deem appropriate.

Respectfully submitted,

Dated: March 16, 2017



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